(6)

No. 90-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TIGER INN,

Petitioner,

—v.—

SALLY FRANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONER'S REPLY MEMORANDUM IN FURTHER SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY

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TABLE OF AUTHORITIES

Cases: PAGE

Statute:

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Petitioner Tiger Inn submits this reply memorandum in further support of its petition for a writ of certiorari and its application for a stay of the order of the Supreme Court of New Jersey pending completion of proceedings in this Court. The initial papers dealt with preservation of the constitutional question by Tiger Inn, the power of this Court to review the conclusions of the lower court, the conflict between the lower court's decision and decisions of this Court, the likelihood that this Court would reverse, the importance of the question presented by this case, the need for a stay, and other matters. The opposing papers focused primarily on the merits (conflict

of the lower court's decision with decisions of this Court and the likelihood that this Court will reverse).

Because of the maze of arguments on the merits in the opposition papers, Tiger Inn files this reply to re-identify the issue presented to this Court for review: may the members of a private social organization which satisfies all the criteria for the protection of the federal constitutional right to freedom of association be deprived of that right by virtue of a few tenuous connections with a public institution?

The Supreme Court of New Jersey ruled that the right could be taken away because of the connections. *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990). (Appendix to Petition "A." at 1.) This was the basis for the decision in the Court below, it was the sole basis, it is an issue never considered by this Court, and it is one which will undoubtedly arise in numerous other litigations involving private social organizations. We respectfully urge that it be clarified by this Court.

The Court below determined that, because of three factors, Tiger Inn was a "part" of Princeton University and that, because Princeton University was "a place of public accommodation" (an issue never litigated in this or any other case), Tiger Inn was also a place of public accommodation and not entitled to the federal right. The New Jersey Court relied on no other issues, facts, or circumstances to find against Tiger Inn. The three factors used by the New Jersey Supreme Court to deprive Tiger Inn's members of their right to freedom of association lack the substance to sustain this severe result.

In our petition we dealt with the issue of Princeton's "reliance" on Tiger Inn to feed undergraduates. (Petition "Pet." at 5.) Aside from the outright denial of reliance by the University's general counsel (Pet. at 5; Record below "R." at 3070a, 3065a-66a, 3072a), we fail to see how an educational institution with large and varied dining facilities that feed more than 3,000 students could not feed the 120 members of Tiger Inn if that became necessary.

We have also shown that the second factor (the Princeton student body is the source of Tiger Inn's undergraduate members) has no substance. (Pet. at 5.) If anything, this factor is evidence of exclusivity and personal choice, *i.e.*, membership is not routinely available to the community at large. And this criterion is no different than a private social organization limiting its membership to any other identifiable group.

The third factor ("The Clubs are held out as part of a club system which serves Princeton students") has no substance relating to Tiger Inn. As far as the University is concerned, Tiger Inn is an "unperson" in the tradition of Orwell's *1984*. It is not listed by the University as a dining facility, as a social facility, or as an organization related in any way to the University. In fact, as far as we can tell, it is not listed by the University in any way whatsoever (the twelve other eating clubs are listed). Princeton has no dean or other person in charge of "the clubs," let alone Tiger Inn (the Tiger Inn graduate board is in charge). It does not discipline Tiger Inn members for conduct at Tiger Inn (the Tiger Inn graduate board disciplines). University proctors may not set foot on Tiger Inn's grounds (the local police are called if necessary). (R. at 721a-22a, 5327a, 5380a; Testimony of Thomas Wright, August 4, 1986 "Wright" at 74-76.)

Princeton University and the eating clubs have a meal exchange program. Tiger Inn does not participate. Neither does Tiger Inn participate in University or club intramural athletic programs (the eating clubs participate in these programs). (Exhibits to Tiger Inn's motion dated October 28, 1987.) Tiger Inn refused to participate in financial studies of the eating clubs sponsored by Princeton University (the eating clubs participated). (Testimony of Stuart Rickerson, August 1, 1986 "Rickerson" at 114-15; Wright at 74-75.)

Tiger Inn is not a member of the Prospect Foundation, which supports the libraries and study facilities of the eating clubs. (R. at 723a, 3169a.) Contrary to Respondent Frank's argument (she has probably never seen it), the Tiger Inn

"library" is about the size of the collection of books an ordinary undergraduate would accumulate during his four year course of studies and is composed of the usual useless sets of novels and poems by unread authors in many volumes printed decades ago and gathering undisturbed dust.

Respondent Frank draws a picture of Tiger Inn as if it were a public restaurant during a continuous New Year's eve: endless parties, guests in every corner, unknown persons wandering about aimlessly, and women everywhere at all times. This may be true of other eating clubs, but it is not true of Tiger Inn. In fact, no person may be present in the club building or on the club grounds unless expressly invited by a member. On the few party weekends each year, each guest must also have a pass; and personnel hired from public security agencies, not University personnel, are retained by Tiger Inn to enforce the restrictions. At times Tiger Inn is closed to all but members; for some functions, no guests are permitted at all; and for others, like every other private social organization, Tiger Inn allows each member to bring any guest he might choose. To no one's great surprise, some of these guests are women. (R. at 721a, 5379a; Rickerson at 150-51.)

The briefs submitted in opposition to the pending petition and the pending motion confuse the issue presented to this Court with other issues that were not brought here by anyone for review, were not the basis for the decision in the Court below, or were, in effect, decided in favor of Tiger Inn in the Court below. The Court below recited without adverse conclusion the facts which show Tiger Inn to be a private organization (A. at 7a-11a.) and rested its decision entirely on the three supposed connections with a public institution. As a consequence, all of the lengthy discussion of numbers of members, admissions procedures, social functions at Tiger Inn, access by the public, etc., are irrelevant to the issue presented here and ought not to be used as a basis for this Court's decision on the pending applications. In any event, many of the facts recited in the opposition briefs do not involve Tiger Inn (but are treated as if they do) or occurred

long before the period involved in this lawsuit. A few examples follow:

Respondent speaks at length of numbers of members and criteria for membership. Clearly, the day to day life of Tiger Inn is lived and breathed by its undergraduate members, whose number has fluctuated widely over the recent years. They eat three meals a day together, study, play cards, shoot pool, and enjoy their other social activities in a far more concentrated personal association than almost any other private club. As one witness put it, "The membership has to feel 100 percent about an individual that they would like that person to join as a member and share the next year or two." (Rickerson at 110-11, 153-55.) Tiger Inn also has somewhat more than 1600 graduate and other members, many of whom never set foot in Tiger Inn after graduation. They have virtually nothing to do with the life of Tiger Inn or its undergraduate members.

Relying on the decisions in *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), Respondent argues that, by numbers alone, Tiger Inn's members do not enjoy the kind of intimate social relationship protected by the Constitution. (Brief in Opposition "Opp." at 12-13.) But the Rotary organization had 907,750 members in 19,788 chapters in 157 countries [481 U.S. at 540]; and the Jaycees had 295,000 members in 7,400 chapters in 51 states plus 11,915 associate members, many of whom were women. [468 U.S. at 613.] As the concurring opinion in the *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), states, even clubs with more than 400 members "may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence." [487 U.S. at 19.]

As far as selectivity and the acceptance rate are concerned, the selection process begins its winnowing much earlier than the final acceptance pool. The candidates are identified before bicker through participation with members on athletic teams, sharing of dorm facilities, attendance in common

classes, and service in campus organizations. Some who become candidates are cut during bicker; and for those who last to the final pool, bids are awarded to some but never all. Tiger Inn has never offered membership to anyone without the 100% vote of the undergraduate members, has never accepted a member through any "hat-bid" procedure, and has certainly never participated in a "dice-roll" for membership of a candidate. (Rickerson at 112; R. at 3167a.) Once again, this may be true for others but not for Tiger Inn (another example of Respondent's use of facts relating to others in an effort to make a case against Tiger Inn). These are precisely the criteria for a private social organization protected by the Constitution.

Mindful of the need for brevity, we halt this recitation and ask the Court to note any reference by Respondent to "the clubs" or "a club." That means Tiger Inn was not involved (or even refused to be involved), but Respondent would like Tiger Inn to be tarred with the event anyway.

In addition, Respondent relies heavily on the three recent decisions of this Court, *Roberts*, *Rotary*, and *New York Club Association*, but reads them in a way that would extinguish all private social organizations (if the organization is more than a family in nature, it is not protected). That was not the holding or the rationale for the result in those cases.

In *Roberts*, the Jaycees case, the Court noted "the changing nature of the American economy and . . . the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." It then commented on "the various commercial programs and benefits offered to members" and held that women should have "equal access to such goods, privileges, and advantages. . . ." [468 U.S. at 626.]

In *Rotary International*, the Court noted that the Rotary is "an organization of business and professional men;" that it "includes a representative of every worthy and recognized

business, professional, or institutional activity in the community" that it has "businesslike attributes" including a "complex structure, large staff and budget, and extensive publishing activities;" that its membership is intended to "raise the standards of the members' businesses and professions," and that members are "encouraged to invite business associates and competitors to meetings." [481 U.S. at 539, 540, 542-43, 546, and 547.]

Because the New York City ordinance in the *New York Club Association* case was aimed directly at organizations in which business was transacted, no litany of quotations is necessary. The concurring opinion succinctly stated the core of that case as follows:

> "Predominately commercial organizations are not entitled to claim a First Amendment associational . . . right to be free from the anti-discrimination provisions triggered by the law." [487 U.S. at 20.]

Confronted with the fundamental undisputed fact that no business is conducted by Tiger Inn or on its premises, the rationale for the outcome of these three cases is inapplicable.

Whether we speak of eating clubs (Princeton University), Final Clubs (Harvard University), Senior Societies (Yale University), fraternities (virtually every university, including Princeton), sororities (virtually every university, including Princeton), or the many other truly private, truly social organizations, they are essentially the same. In fact, in 1979, Respondent filed a claim of discrimination against Tiger Inn under the federal statute; but it was dismissed on the ground that Tiger Inn was exempt because it was "a social fraternity . . . , the *active* membership of which consists primarily of students in attendance at an institution of higher learning . . ." (emphasis supplied); (20 U.S.C. § 1681(a)(6)(A); Letter Order from Tejada, Director, Office of Civil Rights, to Bowen, President, Princeton University, dated April 25, 1980.)

Respondent's effort to distinguish fraternities and make Tiger Inn a case of injustice too small to be corrected by a busy court involved in questions of national policy is belied by the brief of the National Interfraternity Conference filed in support of Tiger Inn's petition. Leaving aside the many public statements by Respondent and the New Jersey Division on Civil Rights about the broad significance of this case (*e.g.*, Pet. at 13-14), the amicus brief makes its national impact clear; and so does the national press and television coverage it has received.

Tiger Inn is the quintessence of the private social institution founded on the constitutional right to freedom of association. Whether a private social organization may be deprived of its federal right by virtue of ties with a public organization has not been considered by this Court in the past but is a significant issue in present and future litigation involving private social organizations, *e.g.*, *Schkolnick v. The Fly Club*, 81 BPA-0097 (Mass. Comm. Against Discrimination, March 24, 1990). The thoroughly litigated record in this case (more than 9,000 pages) will allow a careful resolution of this question. Therefore, we respectfully urge this Court to grant the petition for certiorari. We also respectfully request that the decision below be stayed until resolution of the case.

Respectfully submitted,

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